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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

ROBERT KELLY,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether a defendant's Fifth and Fourteenth Amendment rights against self-incrimination and to due process are violated by the use of the defendant's post-arrest silence to impeach testimony offered at trial when it was not established that the defendant's silence was induced by the *Miranda* warnings because the defendant had suffered a physical blackout.

2. Whether a defendant's Sixth Amendment right to put forth a defense and to challenge witnesses against him is violated by a state evidentiary rule requiring that medical opinion testimony supporting the defense must be provided "with a reasonable degree of medical certainty" rather than with a "might or could have" opinion.

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ROBERT KELLY,
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v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

Robert Kelly respectfully petitions for a writ of certiorari to review the judgment of the Illinois Court of Appeals.

OPINIONS BELOW

The opinion and order of the Illinois Court of Appeals affirming Mr. Kelly's conviction and sentence entered by the trial court is unreported, and is included in the appendix hereto at A-1. The order of the Illinois Supreme Court denying Mr. Kelly's petition for leave to appeal is included in the appendix hereto at A-2.

JURISDICTION

The Illinois Court of Appeals affirmed the trial court's conviction and sentence on July 21, 2000. The Illinois Supreme Court denied the petition for leave to appeal

on November 29, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and causes of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section One of the Fourteenth Amendment of the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition raises constitutional issues of significant importance for criminal defendants. It concerns the proper use of post-arrest silence and a defendant's ability to present a full and complete defense. Robert Kelly, the defendant here, is a wrongly convicted Vietnam veteran who was precluded from putting on a defense and whose constitutional rights to due process, to confront the evidence against him, and against self-incrimination were violated. The Illinois Appellate Court majority opinion, of which we seek review, has far-reaching implications.

I. Proceedings Below

Robert Kelly was arrested on November 22, 1996 for the offenses of Driving under the Influence of Alcohol ("DUI") and Driving While License Revoked ("DWLR"). On January 22, 1999, a jury found Mr. Kelly guilty of DUI and DWLR in violation of Chapter 625, Act 5, Sections 6-303(D) and 11-501(A)(2)/(D)(1)(A) of the Illinois Compiled Statutes Annotated 1992, as amended. On March 16, 1999, the trial court sentenced Mr. Kelly to three years in-

carceration with the Department of Corrections, the maximum sentence for a Class 4 Felony.

The Illinois Appellate Court issued its majority opinion and order on July 21, 2000, affirming the trial court's conviction and sentence, with a dissenting opinion. No petition for rehearing was filed. On August 25, 2000, Mr. Kelly timely filed in the Illinois Supreme Court a petition for leave to appeal, and the Illinois Supreme Court denied the petition for leave to appeal on November 29, 2000.

II. Relevant Facts And Evidence Presented At Trial

In 1968, while attending Indiana University on a football scholarship, Robert Kelly, at the age of twenty-one, voluntarily enlisted in the United States Marine Corps. R.224, C278.[1] He served two tours of duty in the bush in Vietnam. R.218, C270, C278-79. Mr. Kelly spent his days in Vietnam "walking point" in a Marine Corps rifle company. R.218-19.

Mr. Kelly served his country with valor and great bravery. He personally was involved in thirty firefights – combat situations involving the exchange of gunfire – during his time in Vietnam. R.219, C350. Twice during the war, Mr. Kelly engaged in mortal hand-to-hand combat. R.219-20, C280. He still bears the physical scars from one of those deadly fights today. R.C280.

In 1971, Mr. Kelly was discharged from the Marine Corps under honorable conditions. R.C270. For his service in combat, he had earned a combat action ribbon, the National Defense Service Medal, the Vietnam Service Medal, and the Vietnam Campaign Medal. *Id.* Unfortu-

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[1] The references to the transcript are noted by the volume and page number of the Illinois Appellate Court record.

nately, Mr. Kelly did not return home the man he was before he left to serve his country in Vietnam. In addition to the physical scars, he bore serious psychological scars from his service to his country. R.C283. Unknown to Mr. Kelly for the next twenty-five years after returning from Vietnam, these experiences ultimately caused him to develop chronic severe Post Traumatic Stress Disorder ("PTSD"), manifested by nightmares, blackouts and explosive behavior, to name a few of his symptoms. R.48-51. Indeed, for many years after his return, Mr. Kelly led a troubled life. R.C280.

On Friday, November 22, 1996, the date of his arrest in this case, Mr. Kelly was a forty-nine-year-old supervisor for the Cook County Forest Preserve District. R.C135, R.211-12. As usual, Earl Pergande, Mr. Kelly's neighbor, co-worker, and friend, drove Mr. Kelly to work that day. R.213. No public transportation ran between Mr. Kelly's home and his job, and Mr. Kelly did not have a driver's license. *Id.* R.80. Mr. Pergande, who did not work in Mr. Kelly's office, usually returned for Mr. Kelly between 4:30 and 5:00 p.m., and they shared the commute home. R.213. That Friday, however, Mr. Pergande had not arrived by five o'clock. R.214. Mr. Kelly became anxious and concerned and began calling Mr. Pergande's pager. *Id.*; R.256. Mr. Pergande did not respond to the pages. R.214. Another half-hour passed, and Mr. Pergande still had not called or come to pick up Mr. Kelly. *Id.* This behavior was uncharacteristic of Mr. Pergande. R.256. In fact, Mr. Pergande never before failed to pick up Mr. Kelly. R.C274.

Around 5:30 p.m., Mr. Kelly borrowed a Forest Preserve car and began driving toward his home. R.214. During his trip, he became convinced that something bad must have happened to his friend. R.C274. Mr. Kelly then

drove past Mr. Pergande's home and saw that Mr. Pergande's car was missing. R.215. Mr. Kelly proceeded toward a tavern near Mr. Pergande's home, where Mr. Pergande could sometimes be found. *Id.* Mr. Kelly drove into the parking lot, but Mr. Pergande's car was not there either. *Id.* Mr. Kelly continued driving in search of Mr. Pergande. *Id.* Approximately an hour later, Mr. Kelly arrived at the Mill Rose, another tavern he knew Mr. Pergande visited. R.215-16. Mr. Kelly saw Mr. Pergande's car in the parking lot there, and Mr. Kelly entered the tavern to find him. R.216.

Mr. Kelly quickly found Mr. Pergande seated at the bar. R.256. Mr. Kelly sat down next to his friend and asked him what had happened. R.216, 256. Mr. Pergande responded by stating that "It's not that big a deal" and telling Mr. Kelly to relax. R.216. Mr. Pergande's nonchalance about stranding Mr. Kelly and failing to return his pages angered Mr. Kelly. R.216. In an effort to diffuse Mr. Kelly's anger, Mr. Pergande bought him a beer. R.216, 257. Mr. Kelly drank half of the beer, but his anger kept growing, as Mr. Pergande offered no further explanation for abandoning Mr. Kelly. R.258. Fearing that his anger might cause him to do or say something to his friend that he would regret later, Mr. Kelly left the tavern, telling Mr. Pergande that they would discuss the matter the following Monday. R.216, 258.

The next thing Mr. Kelly remembers is finding himself in a holding cell. R.216. He eventually was charged with aggravated driving under the influence of alcohol and driving while license revoked. R.C45-46. What Mr. Kelly did not realize at that time, and for some time prior and time to come, is that he had suffered a blackout triggered by PTSD.

Prior to his November 22, 1996 arrest, Mr. Kelly had a history of DUIs and other misconduct. *Id.* He had been convicted of multiple DUIs prior to the night in question. However, since that arrest, Mr. Kelly learned that he suffers from PTSD. *Id.*; R.C262-63. This condition went undiagnosed and untreated until after his 1996 DUI arrest. R.C252.

After his initial diagnosis of PTSD, Mr. Kelly received psychotherapy treatment under the care of Dr. John P. Bair, Director, Dual Diagnosis at the Veterans Administrative Hospital. R.C258-59. Dr. Bair confirmed Mr. Kelly's PTSD diagnosis and the fact that he has suffered from PTSD for many years. R.C261. Dr. Bair testified that Mr. Kelly has displayed PTSD symptoms for years, and he is of the opinion that these symptoms began affecting Mr. Kelly before 1996, the year of his arrest in this case. R.C259, C260, C267. Dr. Bair explained to the trial court in an in-camera session that symptoms of Mr. Kelly's PTSD include intrusive thoughts, and that PTSD sufferers who experience intrusive thoughts frequently will not recall what transpired during these episodes. R.C261. Dr. Bair further testified that although the prognosis for PTSD sufferers is not good, Mr. Kelly was doing well and likely will continue doing well so long as he remains in treatment. *Id.*; R.C262.

At trial, Mr. Kelly attempted to establish a defense that, rather than being intoxicated, he suffered from PTSD symptoms (*i.e.*, a flashback and ensuing memory loss) due to a triggering event earlier in the evening of the night in question. R.778-82. In support of this defense, Mr. Kelly intended to call Dr. Bair at trial. However, before trial began, the trial judge ruled that Dr. Bair could not offer testimony regarding whether Mr. Kelly suffered from a PTSD-induced blackout, rather than intoxication, on the date in

question. *Id.* The court stated that such testimony is barred because "[h]e [Dr. Bair] was not there." R.778. The court added:

> If the defense could present evidence of that, that is the ultimate question for the jury to decide if the defendant – if there was a blackout or lapse, was it caused from alcohol as alleged by the prosecution or was it caused from a physical or mental condition? That is what the jury is going to have to decide.
>
> * * * *
>
> No medical witness is going to be allowed to testify to their opinion on that ultimate issue. R.779.

The court continued: "If he says that blackouts are a symptom of the disease, that's what he says. But he certainly is not and cannot say well, it's possible that the defendant suffered one on that date." R.780. The court concluded: "Whether it was disease related or alcohol related is for the Trier of Fact." R.782.

The trial court further ruled that Dr. Bair could testify that Mr. Kelly had developed PTSD by the date in question *only* if he could so state "to a degree of medical certainty." R.780. In addition, the court ruled that Dr. Bair could state what the symptoms of PTSD are generally, although, pursuant to the court's ruling, Dr. Bair could not state whether Mr. Kelly exhibited those symptoms on November 22, 1996. R.780.

Over defense counsel's objections, the court then required Dr. Bair to testify first in an in-camera pre-trial hearing before being allowed to testify at trial. R.785-86.

During the in-camera hearing, Dr. Bair provided testimony on the issue of whether Mr. Kelly suffered from PTSD on the date in question and prior thereto. Specifically, Dr Bair stated:

> Q. Would you be able to say with any degree of medical certainty or psychological certainty that Mr. Kelly had P.T.S.D. prior to 1996?
>
> A. I believe that to be so. Certainty is a rare commodity. R.763 at 10.

During this testimony, the trial court again emphasized: "It [Mr. Kelly's behavior] may be a symptom of alcohol abuse and it may be a symptom of not alcohol ingestion [sic]. That would be for the trier of fact to decide." *Id.* at 23. Under cross-examination during the in-camera hearing, Dr. Bair testified:

> Q. Can you say with a degree of medical certainty that he suffered from this disorder either alone or in combination with the others you mentioned on November 22, 1996?
>
> A. I believe that he had features and was subject – was at some level experiencing post-traumatic stress disorder. The degree I can't comment on to what degree, how florid, how passive, how active, I can't comment. *Id.* at 29.

Dr. Bair further testified:

> Q. [D]o you have an opinion whether or not he was suffering from P.T.S.D. in any form on November 22, 1996?

> A. The opinion I would offer is that again I would prefer to have further diagnostic information available to me to respond. If you are asking me to give an inclination based on this phase of my treatment, I would say I believe he had P.T.S.D.
>
> Q. Based on what you have done, you believe that he had P.T.S.D., is that correct?
>
> A. That's correct. *Id.* at 31.

After reviewing Dr. Bair's in-camera testimony, the court concluded that it "cannot be probative and therefore is not relevant and is not admissible." R.756. Specifically, the court held:

> [I]n order for Dr. Bair to testify, he has to be able to say to a reasonable degree of medical certainty that on the day in question, the defendant suffered from this disorder. And then the symptoms of the disorder may have been probative to the issue in the case. But because he cannot say that on the date of November 22, 1996, that he had the disorder, then his testimony is not going to be admissible. R.779-80.

Thereafter, the court granted an oral motion by the State and ruled that Mr. Kelly also could not testify that he had been diagnosed with PTSD or that he was suffering from PTSD on the night in question, reasoning that such testimony would be based on hearsay. R.573-75, 579.

During the trial, Mr. Kelly testified on his own behalf. R.211. Mr. Kelly did not recall the accident or his arrest. R.216. Mr. Kelly explained that he was not receiving psychological treatment at the time of his arrest, even

though he previously had suffered blackouts such as this one. R.217. Mr. Kelly testified that these blackouts began after he returned from Vietnam. R.218. He stated that he was not under the influence of alcohol on the night he was arrested, but the trial court precluded him from answering whether he was experiencing some type of psychological problem that night. R.223. Mr. Kelly did testify that on at least one prior occasion, he had driven somewhere without realizing it. *Id.*

Contrary to the trial court's warnings against evidence regarding Mr. Kelly's exercise of his constitutional right to remain silent, and despite assurances to the contrary, the prosecution asked Mr. Kelly the following questions during cross-examination:

> Q. After your vehicle was stopped on November 22, 1996, did you ever tell any Hoffman Estates police officer that you had suffered a memory loss and that you weren't driving under the influence of alcohol?
>
> A. I don't know. R.284.

The prosecutor continued:

> Q. Did you tell any officer at that time that you had not been under the influence of alcohol and that you had some sort of a memory problem?
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> DEFENSE COUNSEL: If I may, Judge, he's not under an obligation to tell anybody. In fact, he has a Constitutional right not to say anything.

THE COURT: You can answer the question.

A. Did I tell any officer that I was not under the influence the night before?

Q. Right.

A. I don't believe I did.

Q. But that's what you're telling this jury today, isn't that right?

A. Yes.

Q. That you were not under the influence of alcohol and you had some sort of a psychological blackout?

A. Yes. R.284-85.

This series of questions concluded the prosecution's cross-examination. R.285.

During rebuttal in closing argument, in response to Mr. Kelly's testimony indicating that he suffers from a psychological disorder, the prosecution argued, "They have subpoena powers. Why didn't they have somebody come in and tell you about his condition?" R.346. In addressing defense counsel's objection, the prosecution insisted that this argument was proper because it was invited by defense counsel during closing argument. R.363. Specifically, during closing argument, defense counsel had stated, "And there's enough facts out there to tell you that Mr. Kelly's story is true. You didn't hear anybody get up here and say there's no such problem." R.331. During its rebuttal argument, the State also emphasized its impeachment of Mr. Kelly with his post-arrest silence. The jury returned a verdict of guilty.

III. The Illinois Appellate Court Majority Opinion

On July 21, 2000, the Illinois Appellate Court affirmed, in its majority opinion, the jury conviction and the sentence imposed by the trial court. The majority opinion held that the trial court did not prevent Mr. Kelly from presenting a defense, but prevented him only from presenting Dr. Bair's medical opinion testimony. A-1 at 5a. The majority opinion agreed with the trial court's determination that Dr. Bair's testimony was inadmissible unless he could state with a reasonable degree of medical certainty that Mr. Kelly suffered from PTSD at the time of the incident.

Further, the Illinois Appellate Court majority opinion recognized the principle of law that a defendant's post-arrest silence may not be used to impeach exculpatory testimony offered for the first time at trial. *Id.* at 6a – 7a (citing *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45 (1976)). However, the majority opinion also identified exceptions to this principle, including that when a defendant's exculpatory testimony at trial is inconsistent with his statements made after the arrest, then the prosecution's comment or offer of evidence concerning the defendant's failure to offer the same testimony is not improper. *Id.* The majority opinion found that Mr. Kelly's claim of a blackout negated his claim of silence induced by *Miranda*,[2] and the prosecution's comment concerning Mr. Kelly's failure to give the same testimony did not violate the *Doyle* rule. *Id.* at 9a – 10a.

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[2] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

IV. The Illinois Appellate Court Dissenting Opinion

The dissent recognized a violation of Mr. Kelly's constitutional right to due process and concluded that it was improper for the trial court to exclude the proffered medical testimony of Dr. Bair. A-1 at 14a. Indeed, the dissent found that Dr. Bair's medical testimony is "critical to the defendant's theory of defense." *Id.* The dissent concluded that Mr. Kelly was prejudiced severely because "the exclusion of . . . [the medical] testimony cut deeply not only into the defendant's ability to argue that he was suffering from PTSD, but also into his credibility as a witness." *Id.*

The dissent also concluded that the trial court likewise violated Mr. Kelly's constitutional right against self-incrimination by permitting the prosecution to impeach him with the exercise of his right to remain silent. *Id.* at 15a. Indeed, the dissent concluded that there was a "clear violation of [Mr. Kelly's] right to remain silent" after his arrest. *Id.* This violation, according to the dissent, arose out of the prosecution's improper questioning of Mr. Kelly at trial about his failure to seek medical attention or ask for assistance when he awoke in jail from a blackout. *Id.* (citing *Doyle*, 426 U.S. at 618, 96 S. Ct. at 2245) (holding that it is "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial")). Notably, the dissent found that the analysis of the Illinois Appellate Court majority opinion on this issue confused post-arrest silence, which may not be the subject of proper comment by the State, with post-arrest statements about which the State may make proper comment. *Id.* at 16a. As such, the dissent concluded that the majority's decision "has wrongly implied that a defendant's silence must be induced by the *Miranda* decision to be shielded from prosecutorial inquiry." *Id.*

As explained below, the far-reaching implications of this decision will have a significant impact on criminal cases as it directly effects the ability of criminal defendants to present a defense, and it directly effects the significance of post-arrest silence as well. These key issues are of constitutional magnitude, which merit review by this Court. Therefore, this Court should grant Mr. Kelly's petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. This Court Should Grant The Petition To Clarify Whether A Defendant's Post-Arrest Silence Must Be Induced By *Miranda* Warnings To Be Shielded From Prosecutorial Comment.

In this case, the State used a defendant's post-arrest silence, which was caused by a PTSD-induced blackout, to impeach testimony he offered at trial. Based on his blackout, Mr. Kelly could not testify that he was *Mirandized*, and that his silence was predicated on *Miranda* warnings. The State's use of his post-arrest silence was fundamentally unfair and a denial of due process. The decision below "has wrongly implied that a defendant's silence must be induced by the *Miranda* decision to be shielded from prosecutorial inquiry." A-1 at 16a.

The officer who arrested Mr. Kelly testified at trial that he asked Mr. Kelly if he would like to answer any questions after he read Mr. Kelly his *Miranda* rights. R.474. Defense counsel objected, raising Mr. Kelly's constitutional right not to answer questions, and the trial court, sustaining the objection, admonished the prosecution that it was on "dangerous grounds." R.475. The State assured the court that it had no intention of commenting on the defen-

dant's exercise of his constitutional right to remain silent. R.478. However, later at trial, the State disregarded the court's warning, its own assurances, and Mr. Kelly's constitutional rights by proceeding to use Mr. Kelly's post-arrest silence against him. In effect the State impeached Mr. Kelly on his defense to the DUI charge – that he suffered from PTSD rather than that he was under the influence of alcohol. The State also stressed the importance of this impeachment during the rebuttal portion of its closing argument.[3]

Despite its earlier instruction, the trial court permitted this impeachment and recklessly disregarded Mr. Kelly's constitutional rights to remain silent after his arrest and to due process. This method of impeachment violates a defendant's Fifth and Fourteenth Amendment rights against self-incrimination and to due process. *Doyle*, 426 U.S. at 619, 96 S. Ct. at 2245. Indeed, this Court has recognized that "it would be fundamentally unfair and a denial of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.*

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[3] Indeed, the danger of this impeachment testimony is illustrated by the prosecution's improper closing argument. As a result of pre-trial rulings, Mr. Kelly was denied the right to have Dr. Bair testify to his psychological condition. However, the State did have the ability to produce any witness to rebut Mr. Kelly's defense, including Dr. Bair. In closing argument, the State created the false impression that the parties had equal access to medical/psychiatric testimony, and the State improperly implied that Mr. Kelly had an affirmative obligation to prove his defense to be found not guilty. Of course, the trial court's ruling barring the evidence of Mr. Kelly's PTSD made it impossible for Mr. Kelly to introduce evidence supporting his defense. The State's improper comments during closing argument improperly shifted the burden of proof from it to Mr. Kelly, thereby violating his constitutional right to due process.

at 618, 96 S. Ct. at 2245. A defendant's post-arrest silence should be protected as an absolute right and not solely dependant on the issuance of the *Miranda* warnings.

This Court recently recognized that "the [*Miranda*] warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 2336 (2000). In *Dickerson*, this Court concluded that *Miranda* announced a constitutional rule that Congress may not supercede legislatively. *Id.* This Court declined to overrule *Miranda* and reaffirmed the decision's core that unwarranted statements, as well as a defendant's silence, may not be used as evidence or impeachment by the prosecution.

Similarly, this Court also should clarify that a defendant's post-arrest silence need not be induced specifically by the *Miranda* warnings to be shielded from prosecutorial comment. In this case, the jury likely inferred that because Mr. Kelly did not explain that he suffered from PTSD at the time of his arrest, then his contention at trial that he suffers from PTSD must be a lie. The State clearly attempted to create such an improper inference. Evidence of Mr. Kelly's silence had no probative value and was substantially outweighed by its unfair and prejudicial impact. This substantial violation of Mr. Kelly's constitutional rights undoubtedly affected the outcome of his trial.

This ruling, in effect, has opened the door to prosecutorial inquiry at trial in all criminal cases when a defendant is silent after arrest regardless of the issuance of the *Miranda* warnings. Allowing the prosecution to use post-arrest silence as evidence of guilt will have a monumental effect on all criminal defendants' rights that otherwise are – and should be – protected under the Fifth and Fourteenth Amendments.

II. This Court Should Grant The Petition Because A Defendant's Sixth Amendment Right To Present A Defense Should Not Be Limited By A State Evidentiary Ruling Which Prevents The Defendant From Introducing Medical Opinion Testimony On An Ultimate Issue Of The Case.

Mr. Kelly, like every criminal defendant, has an absolute right – guaranteed by the Sixth Amendment – to confront the evidence against him and to put forth a defense. The exclusion of Dr. Bair's testimony deprived Mr. Kelly of that right. In defense to the DUI charge, Mr. Kelly attempted to assert at trial that he was not under the influence of alcohol while driving on the night in question, but instead, the symptoms of PTSD caused him to behave erratically and appear to be intoxicated. Yet, the trial court prevented Mr. Kelly from presenting this valid defense. This exclusion of evidence violated Mr. Kelly's Sixth Amendment right to present a defense.

The majority opinion sets forth a standard that denied Mr. Kelly the opportunity to present evidence which would have cast doubt on an essential element of the State's case – namely, that Mr. Kelly was under the influence of a psychological disorder rather than under the influence of alcohol. The court imposed an unreasonable standard, inconsistent with the Sixth Amendment, to bar Mr. Kelly's defense. The trial court's ruling that Dr. Bair "has to be able to say to a reasonable degree of medical certainty" that Mr. Kelly suffered from PTSD on November 22, 1996 is contrary to the rights guaranteed by the Sixth Amendment. Although opinion witnesses may not base their testimony on "conjecture or speculation," they may testify as to what "might or could have" caused something to occur. A "might or could have" opinion is probative, whereby the opposing party is free to point out

weaknesses in the testimony, and the jury can determine what weight to give the testimony.

Clearly, a defendant is entitled to put forth a defense that tends to negate his guilt – or at least establishes reasonable doubt. Indeed, this Court has recognized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1949 (1973). A defendant must not be put in a position of having to prove his innocence when the application of a state evidentiary rule deprives the defendant of his ability to present any such defense. The exclusion of Dr. Bair's testimony deprived Mr. Kelly of his fundamental constitutional right to present a defense. *See Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2891 (1987) (exclusion of a criminal defendant's hypnotically-refreshed testimony violated defendant's Sixth Amendment right to present a defense); *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142 (1986) (blanket exclusion of proffered testimony about the circumstances of a defendant's confession deprived him of a far trial in violation of the Sixth Amendment).

Dr. Bair testified that Mr. Kelly did, in fact, suffer from PTSD on the evening in question, although he stated that he would like to see additional material before he offered that opinion with the "rare commodity" of certainty. R.763 at 10. The court, however, rejected Dr. Bair's testimony and prevented him from testifying about Mr. Kelly's psychological disorder. This ruling establishes a standard that excludes relevant, highly probative evidence. Prohibiting the jury from hearing evidence that Mr. Kelly suffers from PTSD deprived him of his right to present a defense and to due process of law. Thus, this case poses the issue of what standard should be applied to determine the admissibility of medical testimony when medical testimony es-

tablishes – or at least provides a reasonable basis for – a defense. The potential impact on criminal cases throughout the country – particularly as science progresses – is enormous.

CONCLUSION

For the foregoing reasons, and in light of the individual violations of Mr. Kelly's constitutional rights and the far-reaching implications for the constitutional rights of all criminal defendants, Petitioner Robert Kelly respectfully requests that this Court grant his petition for a writ of certiorari.

Dated: February 27, 2001

Respectfully submitted,

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APPENDIX A-1

SIXTH DIVISION
July 21, 2000

No. 1-99-1489

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	97 CR 30138
v.	)	
ROBERT KELLY,	)	Honorable John J. Scotillo,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant, Robert Kelly, appeals his jury convictions for driving under the influence of alcohol (DUI) and driving while license revoked and his sentence of three years incarceration. On appeal, defendant contends the circuit court erred in: (1) preventing defendant from presenting a defense when it barred the testimony of defendant's treating psychologist regarding defendant's Post-Traumatic Stress Disorder (PTSD); (2) allowing impeachment of defendant by his post-arrest silence; (3) allowing the State to shift the burden of proof in closing

argument; (4) admitting police inventory sheets into evidence; (5) sentencing defendant to three years incarceration, and (6) finding defendant guilty beyond a reasonable doubt. We affirm.

At trial, the State's testimony revealed that at approximately 7 p.m. on November 22, 1996, defendant drove a car down the median of a four lane highway and through a delineator pole at high speed without headlights, hit another car containing three people, accelerated slightly and then stopped after a police car signaled. Defendant could not produce his driver's license, smelled of alcohol, leaned upon the car and could not pass any field sobriety tests. He told officers he was coming from a local tavern and repeatedly asked the officers to give him a "break." He was taken to the station, refused a breathalyzer test, and read his *Miranda* rights. Again, he stated that he was coming from a local tavern and again, asked the officers to give him a break.

One of the officers involved in the arrest testified he had been a police officer for 22 years, had made between 75 and 100 arrests for DUI and that defendant was drunk at the time of the incident.

Defendant testified that November 22, 1996, a Friday, he waited after work for a friend to retrieve him. When the friend did not appear, defendant took one of his employees cars to look for him. He found his friend at a local tavern where his friend bought him a glass of beer. Defendant drank half the glass and then became angry at his friend for not retrieving him. Defendant left the tavern but did not recall anything until he awoke in his cell at the police station. Defendant believes he blacked out.

Defendant testified that this was not the first time he blacked out or could not recall what happened and that

these occurrences began after he returned from Vietnam, where he was involved in approximately 30 fire fights and two hand in hand combats. He also testified that he would forget things and "just lose time." He testified that he had surgery on his left knee making him unable to stand on one foot and maintain his balance.

On cross-examination, defendant admitted that he did not tell anyone at the police station that he had blacked out.

The defendant was found guilty and sentenced to three years incarceration. He appeals.

On appeal, defendant contends the circuit court erred in preventing defendant from presenting a defense when it barred the testimony of defendant's treating psychologist regarding defendant's Post-Traumatic Stress Disorder (PTSD). Defense counsel made an offer of proof, stating:

> "Mr. Kelly suffers from post-traumatic stress disorder with delayed onset as a result of his experience in Viet Nam where he participated in [a certain] number[] of fire fights, some of which included mortal hand-to-hand combat. That Dr. Bair would testify regarding the symptoms of post-traumatic stress disorder, including, but not limited to panic attacks, hyper-vigilance, and flashbacks, and that as a result of these flashbacks that Mr. Kelly would often appear to be disoriented or would have periods of time in his life where he couldn't account for what transpired. *That Mr. - Dr. Bair would not be able to testify with any degree of medical certainty that Mr. Kelly had a flashback on the particular night in question, but only merely that Mr. Kelly does and has suffered from these*

particular episodes over a period of time." (Emphasis added.)

The circuit court held a hearing as to the proffered testimony's admissibility. At the hearing, Dr. Bair testified:

> "THE COURT: Can you say with a reasonable degree of medical certainty that he suffered from this disorder either alone or in combination with the others you mentioned on November 22, 1996?
>
> DR. BAIR: I believe that he had features and was subject -- was at some level experiencing post-traumatic stress disorder. The degree I can't comment on to what degree, how florid, how passive, how active, I can't comment.
>
> * * *
>
> THE COURT: But can you say with a degree of medical certainty that he suffered from this disorder on that day?
>
> DR. BAIR: I am concerned because I wasn't called here as an expert witness. Had I been, I would have done more testing. I would have had more information so that for you to ask me can I say with certainty. Before I would want to go on record and in court making any kind of comment on certainty, I would want to have further information available to me, further diagnostic information including , military records. *** I think the certainty question would be if one were called as an expert witness there would be usual and customary, extensive diagnostic information that one would bring with him. I can as a psychologist providing

psychotherapy. I would suggest to the Court that more information--

THE COURT: You are not prepared to offer that certainty without conducting those tests?

DR. BAIR: Right.

After the hearing, the court concluded:

"So to be clear, I'm not saying this is not a recognized disorder. I think, in fact, it is. The witness testified that the defendant has a disorder as of today. But because he's not prepared to say that the defendant had the disorder on the date of the incident, I find that his testimony then cannot be probative and therefore is not relevant and is not admissible.

A witness, whether expert or lay, may provide an opinion on the ultimate issue in a case. *People v. Terrell*, 185 Ill. 2d 467, 496 (1998), *Richardson v. Chapman*, 175 Ill. 2d 98, 107 (1997). This is so because the trier of fact is not required to accept the witness' conclusion and, therefore, such testimony cannot be said to usurp the province of the jury. *Terrell*, 185 Ill. 2d at 496-97; *Richardson*, 175 Ill. 2d at 107-08. However, decisions with regard to the admissibility of evidence are not necessarily grounds for reversal. *People ex rel. Department of Transportation v. Birger*, 155 Ill. App. 3d 130, 134 (1987).

Here, the circuit court did not prevent defendant from presenting a defense, but prevented defendant from presenting this particular witness who, by his own testimony and by the offer of proof, was not prepared or capable of testifying that defendant suffered from PTSD at the time of the incident. Defendant's first contention of error is without merit.

Defendant also argues that, prior to Dr. Bair's testimony at the hearing, the circuit court erroneously ruled that Dr. Bair could not testify to the ultimate issue in the case. Defendant argues that the court's erroneous ruling "pervaded the manner in which defense counsel was able to assist Dr. Bair in preparation of his testimony which, in turn, significantly contributed to the court's determination that Dr. Bair's testimony was irrelevant in its entirety." However, prior to the hearing, the circuit court informed defense counsel that Dr. Bair "has to get up on the stand and say that he can say with a degree of medical certainty that the defendant suffered from a disease on the date of questioning." Thus, defense counsel was on notice that Dr. Bair's testimony would be inadmissible unless Dr. Bair could state with reasonable medical certainty that defendant suffered from the PTSD on the date of the incident. As discussed, Dr. Bair was unable to testify that defendant suffered from the PTSD on the date of the incident. Accordingly, the circuit court did not err by barring Dr. Bair's testimony.

Second, defendant contends the circuit court erred in allowing the State to impeach him with his post-arrest silence. Defendant cites *Doyle v. Ohio*, 426 U.S. 610, 617-18, 49 L. Ed. 2d 91,97-98,96 S. Ct. 2240,2244-45 (1976). The State responds that defendant's silence was not reliance upon *Miranda*, but upon his claim of "blackout" and thus, subject to cross-examination on the believability of a "blackout."

It is a well established principle of law that a defendant's post-arrest silence may not be used to impeach an exculpatory story told for the first time at trial. *Doyle v. Ohio*, 426 U.S. 610, 617-18, 49 L. Ed. 2d 91,97-98, 96 S. Ct. 2240, 2244-45(1976). However, the rule established in *Doyle* is not without exception. There are circumstances in

which the State may permissibly comment on post-arrest silence at trial. For example, where the defendant at trial falsely claims that he also gave his exculpatory statement to the police when arrested, he may be impeached with evidence that he did not do so. Additionally, where defendant's exculpatory testimony at trial is manifestly inconsistent with statements made after arrest, any comment or evidence concerning his failure to give the same statement at that time will not violate the *Doyle* rule. *People v. Johnson*, 170 Ill. App. 3d 828,834 (1988); *Anderson v. Charles*, 447 U.S. 404, 408, 65 L. Ed. 2d 222, 226, 100 S. Ct. 2180, 2182 (1980).

Defendant testified that he did not remember walking to his car, putting the keys in the ignition and driving the car. He testified he did not remember seeing the police lights, stopping the car, getting out of the car, leaning against the car, trying to perform field sobriety tests, being placed under arrest, signing documents in the booking area or receiving his personal possessions the next morning. Specifically, defendant gave these answers to these questions:

"Q: Now, you testified that you came to in the lock-up of the Hoffman Estates Police

Department. Is that correct?

A: Yes.

Q: When you came to in the lock-up areas, did you ever ask any police officers for medical treatment?

A: No.

Q: Did you ask somebody to take you to the hospital?

A: No.

Q: Did you tell anybody that you just had another one of these terrible memory events?

A: No."

No objections were raised to these questions and answers.

The defendant also testified:

"Q: After your vehicle was stopped on November 22, 1996, did you ever tell any Hoffman Estates police officer that you had suffered a memory lapse and that you weren't driving under the influence of alcohol?

A: I don't know.

Q: The next morning, do you know where you were?

A: I knew I was in a police station.

Q: Did you tell any officers at that time --

[DEFENSE COUNSEL]: Objection, judge.

[THE COURT]: Overruled. I didn't hear the end of the question.

* * *

Q: Did you tell any officer at that time that you had not been under the influence of alcohol and that you had some sort of a memory problem?

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Overruled.

* * *

[DEFENDANT]: Did I tell any officer that I was not under the influence the night before

Q: Right.

A: I don't believe I did.

Q: But that's what you're telling this jury today, isn't that right?

A: Yes.

Q: That you were not under the influence of alcohol and you had some sort of psychological blackout?

A: Yes."

Further, during closing argument, the State said:

"And if he had this memory lapse while all this was going on, when he came to in that lock-up area, wouldn't he have looked around and thought, 'Where am I? I'm behind some bars. I'm in a prison somewhere.' I mean, if it were you and me and you had a blackout and you were at the police station, wouldn't you be grabbing the bars saying, 'Someone help me, please. Something is wrong. Why am I here. I don't know why I'm here. I blacked out. I have no memory of what has happened. The last thing I remember was leaving Mill Rose.' He didn't tell one person that, no one that night at the station.

You heard him say that. 'Did you ever ask anybody? Did you ever tell anybody about these blackouts that night?' 'No.' 'How about the next

> morning, sir, when they were taking you to a bond hearing. Did you tell anybody then that you had some blackouts the night before?' 'No.' Does that make sense?'

Clearly, defendant's claim of a blackout negates any claim of silence induced by *Miranda*. The comments made by the prosecutor during closing argument indicate that the State was questioning the credibility of the trial testimony of defendant. Because defendant's exculpatory testimony at trial is manifestly inconsistent with statements made after arrest, any comment or evidence concerning defendant's failure to give the same statement, here, information that he blacked out, does not violate the *Doyle* rule. Defendant's second claim of error is without merit.

Third, defendant contends the circuit court erred in allowing the State to shift the burden of proof in closing argument. Specifically, defendant contends error in the following:

> "Counsel tells you during his statements -- his arguments you didn't hear anyone telling you about his condition. They have subpoena powers. Why didn't they have somebody come in and tell you about his condition?"
>
> The State contends these comments, in rebuttal, were in response to arguments made by defense counsel.

Prosecutors are given wide latitude in making closing arguments. *People v. Williams*, 181 Ill. 2d 297, 330 (1998), and a reviewing court will not reverse a jury verdict based on improper remarks unless they result in substantial prejudice to the defendant. *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998). Although the defense is under no obligation to present any defense, once defendant does

present certain evidence, it is not beyond the reach of appropriate comment by the State. *People v. Phillips*, 127 Ill. 2d 499,527(1989). A circuit court's determination with respect to the propriety of closing argument will not be reversed absent an abuse of discretion. *Armstrong*, 183 Ill. 2d at 145.

The prosecutorial comments here commented upon the quality of the evidence supporting defendant's claim of a black-out and were in response to the argument of defense counsel. Thus, defendant's third contention of error is without merit.

Fourth, defendant contends the circuit court erred in admitting police inventory sheets into evidence. The inventory sheet, signed by defendant when he was booked and signed again just before he was released, was used by the State to establish intoxication. Defendant's initial signature is nearly incomprehensible; in contrast, his signature upon being released is quite clear. The State used the signatures to show that defendant was uncoordinated when he was arrested, but that he regained his coordination before being released. The information describing defendant's personal property was redacted and the signatures, by themselves, are not hearsay because they are not "statements." Thus, defendant's fourth contention of error is without merit.

Defendant's fifth contention of error is the length of his sentence. Although the legislature has prescribed the permissible ranges of sentences, great discretion still resides in the trial judge in each case to fashion an appropriate sentence within the statutory limits. *People v. Fern*, 189 Ill. 2d 48 , 53 (1999); *People v. Wilson*, 143 Ill. 2d 236,250 (1991). The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility,

demeanor, general moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d at 53; *People v. Streit*, 142 Ill. 2d 13, 19 (1991). A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the "cold" record. *Fern*, 189 Ill. 2d at 53; *Streit*, 142 Ill. 2d at 18-19. In considering the propriety of a sentence, the reviewing court must proceed with great caution andnds he was not proven guilty beyond a reasonable doubt. The question before this court is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Moore*, 279 Ill. App. 3d 152,154 (1996). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Janik*, 127 111.2d 390, 402 (1989).

It is undisputed that defendant was driving just before his arrest, and was driving erratically. Further, testimony revealed that defendant drove a car down the median of a four lane highway and through a delineator pole at high speed without headlights, hit another car containing three people, accelerated slightly and then stopped after a police car signaled. He could not produce his driver's license, smelled of alcohol, leaned upon the car and could not pass any field sobriety tests, specifically reciting the alphabet and performing physical tests. He told officers he was coming from a local tavern, where he drank beer, and repeatedly asked the officers to give him a "break." Based upon an airborne automobile, the smell of alcohol, the failing of the field sobriety tests and the defendant's admission that he drank beer prior the incident

and after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Defendant's sixth claim of error is without merit.

Defendant raises no contentions of error concerning his conviction for driving while license revoked and thus, any claim of error for driving while license revoked is waived pursuant to Supreme Court Rule 341 (e)(7) (155 R. 341 (e)(7)).

Thus, defendant's convictions for driving under the influence of alcohol and driving while driver's license revoked, and the sentence of three years' incarceration are affirmed.

Affirmed.

O'BRIEN, J., and BUCKLEY, J., concur.

PRESIDING JUSTICE ZWICK, concurring in part and dissenting in part:

In my view, the trial court erred in determining that Dr. Bair's testimony was irrelevant. In fact, this testimony was critical to the defendant's theory of defense that it was PTSD, and not intoxication, that accounted for his erratic driving and behavior upon being arrested. As defendant correctly argues, there is no longer a requirement that a physician opine with a reasonable degree of medical certainty that the defendant was suffering from a particular malady on the specific day he was arrested. See *Richardson v. Chapman*, 175 Ill. 2d 98, 108, 676 N.E.2d 621 (1997)("[T]he rule against opinions on the ultimate issue no longer has any validity"). The trial court acted improperly in requiring such a foundation. The fact that Dr. Bair could not say whether defendant was suffering from PTSD at the time he was arrested is certainly a fact that undermines the weight of his testimony vis-a-vis establishing that defendant was not intoxicated, but does not render the testimony irrelevant or inadmissible. Whether defendant was suffering from intoxication or PTSD when he was arrested was a question which defendant had the right to submit to the jury.

While decisions with regard to the admissibility of evidence are usually not grounds for reversal (*People ex rel. Department of Transportation v. Birger*, 155 Ill. App. 3d 130, 507 N.E.2d 1321 (1987)), in this case the exclusion of Dr. Bair's testimony cut deeply not only into defendant's ability to argue that he was suffering from PTSD, but also into his credibility as a witness. This is because jurors cannot be expected to understand PTSD or have experience in comparing its effects with that of intoxication. Indeed, the trial court prohibited the defense from even using the phrase if "post-traumatic stress disorder." Although the

State argues that Dr. Bair's testimony was properly excluded because it had no "nexus" to the events which occurred on the night defendant was arrested, one of the inferences which could logically be drawn from the testimony presented is that defendant was not suffering from intoxication, but rather, from the effects of the disorder which Dr. Bair had diagnosed. Defendant specifically denied drinking anything more than half a beer before his arrest and testified that prior erratic behavior and blackouts seemed to be associated with his experience in Viet Nam. This provides a sufficient nexus between the diagnoses of PTSD and defendant's erratic conduct which, if properly explained, could have raised a reasonable doubt in the minds of the jurors as to defendant's intoxication.

In addition, the record shows that the prosecution improperly questioned defendant at trial, commenting on his failure to seek medical attention or ask for assistance upon allegedly waking from a blackout in his jail cell. This was a clear violation of defendant's right to remain silent after his arrest. The State responds that the U.S. Supreme Court has determined that a defendant does not have a due process claim in such a situation unless he was Mirandized and thereby can argue that his post-arrest silence was potentially based upon the police's implicit assurance that he could remain silent without negative consequences to his case. See *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). The State asserts that defendant cannot claim that he was relying upon the arresting officers' *Miranda* warnings in remaining silent after waking in his jail cell because he testified that when he awoke he had no recollection that he had been Mirandized -- and because the U.S. Supreme Court in *Fletcher v. Weir*, 455 U.S. 603, 71 L. Ed. 2d 490, 102 S. Ct. 1309 (1982) determined that it does not violate due process protections for the State to impeach a defendant who remains silent in circumstances

that one might be expected to speak prior to his being Mirandized.

The State's arguments were specifically addressed in *People v. Strong*, 215 Ill. App. 3d 484, 488, 574 N.E.2d 1271 (1991). In *Strong*, the court determined that despite *Fletcher*, Illinois courts have consistently applied the rule with regard to post-arrest silence "without reference to the *Miranda* warning." *Strong*, 215 Ill. App. 3d at 488, citing *People v. Pegram*, 124 Ill. 2d 166, 175-76, 529 N.E.2d at 510 (1988); *People v. Turner* 128 Ill. 2d 540, 563-64, 539 N.E.2d 1196 (1989); *People v. Johnson*, 170 Ill. App. 3d 828, 834, 525 N.E.2d 546 (1988); People v. Nolan, 152 Ill. App. 3d 260, 267-68, 504 N.E.2d 205 (1987); *People v. McMullin*, 138 Ill. App. 3d 872, 876-77, 486 N.E.2d 412 (1985). Instead, the rule in Illinois is that the a defendant's Miranda rights attach immediately upon his arrest. Thus, it is improper for the State to impeach a story told for the first time by defendant at trial even if it is clear that the defendant's silence was not the result of his reliance on Miranda warnings. *Johnson*, 170 Ill. App. 3d at 834. Although there are exceptions to the general rule (see *Johnson*, 170 Ill. App. 3d at 834; *McMullin* 138 Ill. App. 3d at 877), these exceptions are not suggested by the facts of this case. The majority's analysis has confused post-arrest silence (which may not be the subject of proper comment by the State) with post-arrest statements (about which the State may make proper comment). In addition, today's decision has wrongly implied that a defendant's silence must be induced by the *Miranda* decision to be shielded from prosecutorial inquiry. See majority opinion, slip op. at 9.

For the foregoing reasons, I would reverse and remand the matter for further proceedings without reaching the remaining issues, with the exception of whether the

State improperly used the inventory sheet bearing defendant's signature. On this issue, I agree with the majority's analysis. I also agree with my colleagues that defendant's conviction for driving on a revoked license should be affirmed.

APPENDIX A-2

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

90108

November 29, 2000

Ms. Catherine A. Cook
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601

No. 90108 - People State of Illinois, respondent, v. Robert Kelly, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 21, 2000.